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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1287

ROBERT WEINSTEIN et al.,

Petitioners

v.

HOWARD E. BRADFORD et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Ralph S. Spritzer
Howard Lesnick
3400 Chestnut Street
Philadelphia, Pa. 19174

Counsel for Respondents

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Respondents filed suit under the Civil Rights Act, 42 U.S.C. 1983, alleging that they were eligible to be considered for parole but had been denied parole by the State authorities following the conduct of proceedings that failed to meet minimal standards of due process. As noted by the court of appeals (Pet. App. 11), their complaint alleged that the Parole Board failed to accord them a hearing, failed to give them notice of the nature and tenor of, or opportunity to comment on, adverse information upon which the Board subsequently relied, and failed to advise them of the reasons for denial of parole. Without determining the truth of these allegations, the district court had dismissed the complaint on the ground that the Due Process Clause has no application to "procedures designed to determine suitability for parole" (Pet. App. 11).

Observing that the question presented on appeal was "not the right to parole but the right to procedural due process in the consideration of parole" (Pet. App. 12), the court of appeals found "no difficulty in concluding that the due process clause has some application" (Pet. App. 13; emphasis in original) to parole eligibility proceedings. Noting, however, that respondents' allegations of arbitrary procedure had not been proved, the court refrained from deciding what minimal standards of due process might require in the setting of parole eligibility proceedings (Pet. App. 16) and remanded the cause for a determination of the underlying facts. The court below also ruled that suit had properly been brought under 42 U.S.C. 1983.*

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* A companion case filed by South Carolina prisoners similarly claiming a right to procedural due process in the conduct of parole eligibility determinations was consolidated with the instant case in the court of appeals and likewise remanded for an evidentiary hearing on the plaintiffs' allegations of unfairness. The members of the South Carolina Parole Board have not sought review in this Court.

We oppose grant of this Court's writ for the following reasons. First, contrary to petitioners' suggestion, 42 U.S.C. 1983 clearly provides jurisdictional basis for consideration of respondents' claim. Preiser v. Rodriguez, 411 U.S. 475, holding that a prisoner must proceed by habeas corpus (first exhausting state remedies) when he claims a right to release on parole does not govern when a prisoner claims merely that he has a right to have his eligibility for parole considered in accordance with constitutionally acceptable procedures. There is an independent ground, not reached by the court of appeals, for holding that the exercise of federal jurisdiction was appropriate: North Carolina's post-conviction remedies provide no avenue by which a prisoner may challenge the manner in which the State parole system operates. Secondly, we submit that the court of appeals' opinions upon which petitioners rely in asserting that there is an inter-circuit conflict on the question of the applicability of the Due Process Clause to parole eligibility proceedings cannot be considered viable precedents when read against this Court's opinions in Morrissey v. Brewer, 408 U.S. 471; Gagnon v. Scarpelli, 411 U.S. 778; and Wolff v. McDonnell, 418 U.S. 539. This is not only the thrust of the decision below. Precisely the same view has been recently expressed in decisions of the District of Columbia and Second Circuits to which petitioners make no reference. Thirdly, in no

event does it appear that the instant case, involving as it does a ruling of a purely interlocutory character, presents an appropriate vehicle for this Court's review.

1. In Preiser v. Rodriguez, 411 U.S. 475, 482, this Court held that "where state prisoners have challenged the actual duration of their confinement on the ground that they have been unconstitutionally deprived of good conduct time credits, and where restoration of those credits would result in their immediate release from prison or in shortening the length of their confinement . . . [the] state prisoner . . . is limited to the specific remedy of habeas corpus. . . ."* Such an effort "to secure relief from illegal custody" (p. 484) is to be sharply differentiated, the Court made plain, from "a constitutional challenge to the conditions of . . . prison life" (p. 499). Claims of the latter description are remediable under 42 U.S.C. §1983 (ibid). According to Preiser, then, habeas corpus is to be deemed the exclusive remedy if, but only if, (1) the state prisoner is "challenging the very fact or duration of his physical confinement" (ibid) and (2) the relief sought is "a determination that he is entitled to immediate release or a speedier release from imprisonment" (p. 500).

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* There is of course no question that the terms of Section 1983 broadly comprehend "the deprivation" by one acting under color of state law, "of any rights, privileges or immunities secured by the Constitution. . . ." The basis of the Preiser decision was that the broad language of Section 1983 was not conclusive in the situation there presented because the specific federal habeas statute was "explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement. . ." (411 U.S. at 489). If the Preiser rationale is inapplicable to the case at bar, it seems indisputable, therefore, that appellants' claim is properly asserted under Section 1983.

In the instant case, as the court below noted, respondents make no "claim that they have a right to parole so that they would be released prior to the full service of their sentences" (Pet. App. 12): their sole claim is that they have a "right to procedural due process on consideration of parole" (ibid). Neither the legality of their confinement nor its duration is in issue. The situation is thus indistinguishable from that in Wolff v. McDonnell, 418 U.S. 539, 555, a suit under 42 U.S. 1983 in which this Court sustained the authority of the lower federal courts "to determine the validity of the procedures for revoking goodtime credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled."

Although there is no need to go further, we point out additionally that even if habeas corpus were deemed to be the appropriate remedy in this case, there would be no defect for failure to exhaust State procedures. Apart from those provisions permitting an attack on the fairness of the proceedings which resulted in conviction, on the jurisdiction of the sentencing court and on the legality of the sentence (none of which are applicable here), the post-conviction statute (1 C Gen. Stat. N.Car. § 15-217 et seq. (1971 Cum. Supp.)), preserves the remedy of habeas corpus to the extent that it was previously available. However, the North Carolina

habeas corpus statute requires that an application "to prosecute the writ . . . be denied . . . where persons are committed or detained by virtue of a final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction" (1 C G. S. IV C. § 17-4(a). Since respondents do not question the legality of their convictions or sentences, but only the procedures employed by the Parole Board, they have no available State post-conviction remedy or other avenue for seeking relief in the State system.

2. The decision below, rejecting the view that the due process clause is wholly inapplicable to the procedures employed to determine suitability for parole, is plainly correct. A lengthening series of decisions of this Court makes it clear that none of the catch-phrases formerly employed to support a total denial of due process applicability will any longer pass muster. Due process protection has been applied to many types of proceedings occurring subsequent to a conviction — judicial sentencing, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948); revocation of probation, Mempha, supra, and Gagnon v. Scarpelli, 411 U.S. 778 (1973); revocation of parole, Morrissey v. Brewer, 408 U.S. 471 (1972); prison disciplinary proceedings, Wolff v. McDonnell, 418 U.S. 539 (1974) — and it no longer suffices to say that an interest does not merit constitutional protection because it is a "privilege" rather than a "right." Mr. Justice Stewart made the matter clear,

writing for the Court in Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972): "This Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges" that once seemed to govern the application of procedural due process rights." Nor is it controlling that a prisoner has only an "expectancy," and no immediate "right," to parole. The cases cited by the court below (Pet. App. 15 n.3) plainly establish that due process embraces the opportunity to secure a fair determination of a claim even though the claim is inchoate. Differences in the immediacy of the interest do not determine the basic question of whether the due process claim applies; "such differences are material only in determining the context of due process in the particular situation." Hart and Wechsler, The Federal Courts and the Federal System 353 (2nd ed. 1973).

North Carolina law is designed to assure a prisoner that the possibility of conditional freedom will receive serious consideration. North Carolina Gen. Stat. Ann. §148-58 (1964), while providing that parole is not mandatory for any prisoner, is careful to state explicitly that prisoners "shall be eligible to have their cases considered for parole" when the statutorily directed portion of their particular sentence expires, and that a section setting parole eligibility dates "shall be construed as only guaranteeing to every prisoner a review and consideration of his case upon its

merits" (italics supplied). This guarantee of consideration is not merely a pro forma exercise: Of all inmates who left the state's prisons in 1964, over 40% were released on parole.* Thus, appellants are given a statutory promise of the most serious consideration for parole, along with a most substantial chance that their application will be successful.

Indeed, petitioners base nearly their entire case for review by this Court not on the merits of the issue under the decisions of this Court,** but on the asserted existence of a conflict between the decision below and that of other Courts of Appeals (Pet. 4). The fact, however, is that the cases cited were decided before all or some of the Court's decisions in Morrissey v. Brewer, Gagnon v. Scarpelli, and Wolff v. McDonnell, supra. The court below is not alone in noting (Pet. App. 16) the effect of these decisions on the issue. The Courts of Appeals for both the District of Columbia and the Second Circuits have squarely joined the Fourth Circuit in rejecting the position urged by petitioners, United States ex rel. Johnson v. Chairman, 500 F.2d 925 (C.A. 2); Childs v.

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* See the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 61 (1967). The Report points out that "more than 60% of adult felons for the nation as a whole are released on parole prior to the expiration of their maximum sentence" Id. at 60.

** It is plain that the petitioners' brief reference to the "serious problems affecting the structure of criminal justice" raised by the decision below speaks to a matter appropriately to be weighed, as the court below recognized (Pet. App. 16), in determining the content of due process protection in this field, not its applicability.

United States Board of Parole, F.2d (C.A.D.C., No. 74-1052, December 19, 1974),* and in specifically adverting to the effect of the Morrissey-Scarpelli-McDonnell trilogy. Indeed, Johnson was written by Judge Mansfield, the author of one of the cases (Menechino v. Oswald, supra) on which petitioners still seek to rely. Beyond that, as Johnson says with respect to the Menechino precedent (500 F.2d at 926), the decisions said to produce a conflict within the circuits all were decided in response to contentions that applicants for parole are entitled to counsel at parole-release hearings, or to a "whole gamut" (ibid) of trial-type protections, which respondents herein have not sought. In short, the asserted conflict is of just the kind to which Mr. Justice Harlan referred, as not requiring Supreme Court review, when he spoke of situations "where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals." Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 Austr. L.J. 108, 112 (1959).

3. Respondents submit that the decision below is an inapt vehicle for reviewing the broad issue posed by petitioners because it is interlocutory and wholly abstract. The record below consists entirely of the complaint and a motion to dismiss.

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* Although the time for petitioning in Childs, as extended, has not expired, we are advised that the Solicitor General does not propose to apply for the writ.

There is no answer to respondents' allegations regarding the actual operation of the North Carolina parole system, nor any discovery. For this reason, the court below declined wholly to say "how much process is 'due'" (Pet. App. 16). In these circumstances, the issue sought to be posed here by the petition, even if deemed to warrant consideration by this Court, should be examined on the basis of a final judgment, rendered on a full record and calling forth consideration of the entire due-process issue by the court below. This petition is not the appropriate vehicle for such an examination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Ralph S. Spritzer

Howard Lesnick

Counsel for Respondents

May, 1975

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